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In the Supreme Court of the United States

OCTOBER TERM, 1979

RODOLFO MEDINA-HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

Cases:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 606 F.2d 770.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1979. A timely petition for rehearing was denied on October 26, 1979 (Pet. App. A13-A14).

The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment right to the effective assistance of counsel was violated because one retained attorney represented petitioner and two of his co-defendants.

2. Whether the Double Jeopardy Clause was violated by the retrial of petitioner after the court granted petitioner's motion for a new trial because of error in the prosecutor's closing argument.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846. He was sentenced to eight years' imprisonment, to be followed by a five-year term of special parole (Pet. 7). The court of appeals affirmed (Pet. App. A1-A12).

The evidence at trial showed that on September 8, 1977, a DEA undercover agent and a government informant arranged to make a purchase of a large amount of heroin in a tavern in Chicago. Petitioner's co-defendant, Candelario Alcantar, then drove with the informant and another co-conspirator to the residence of co-defendant Jose Lopez in Chicago. Alcantar obtained a bag of heroin there, and the three returned to the tavern where the sale was completed.

Alcantar then left the tavern with the $13,000 that had been used to purchase the heroin and drove to petitioner's house, where petitioner was waiting in the front yard. Alcantar handed petitioner the bag containing the money, and they then walked into the house (Pet. App. A1-A2).

Two weeks later, two more drug sales took place in a similar fashion. On the morning of September 22, government agents saw petitioner leave Lopez's house, put a brown paper bag in the trunk of his car, and drive away. About two hours later, Alcantar and Lopez were observed at petitioner's house. During the time that Alcantar and Lopez were there, one of petitioner's co-conspirators, after meeting with the agent and informant at the same tavern where they had previously met, made several telephone calls to arrange another heroin transaction with his source of supply. The co-conspirator gave the agent and informant a sample of heroin, and they showed him $26,000 in a bag they were carrying. The agent and the informant followed two of petitioner's co-conspirators from the tavern to a location near petitioner's house. One of the co-conspirators met Alcantar and Lopez nearby. After brief negotiations, Alcantar and Lopez went to Lopez's house, which was also nearby, and Alcantar was soon seen emerging from the house carrying a brown paper bag. Alcantar and Lopez returned to the place where the agent and informant were waiting. The agent and the informant paid the co-conspirators $26,000 for a kilogram of heroin (Pet. App. A2-A3).

Later that afternoon, another sale was arranged. Petitioner and Alcantar traveled once again to Lopez's house. Petitioner returned to his house after about 15 minutes. After negotiating with the agent and the informant, who were parked nearby, one of the co-conspirators went to Lopez's house and emerged carrying a bag. Four kilograms of heroin were then passed to the agent and informant through the window of their car parked a short distance away. All the co-conspirators were arrested, including petitioner (Pet. App. A3-A4).

Petitioner and the other co-conspirators were charged in the same indictment. Petitioner was tried alone, however, and was convicted of conspiracy to distribute heroin. After trial, petitioner filed a motion for a new trial, based on a claim of prosecutorial error during closing argument. The district court granted the motion and set the case for retrial. At the second trial, petitioner was again convicted of conspiring to distribute heroin (Pet. App. A4).

ARGUMENT

1. Petitioner first contends (Pet. 10-19) that he was denied the effective assistance of counsel because his trial counsel had represented his co-defendants Alcantar and Lopez. Alcantar had pleaded guilty on the first day of petitioner's first trial and was sentenced prior to petitioner's second trial (Pet. App. A11); Lopez fled prior to trial and is still a fugitive (*ibid.*).

Petitioner argues that the trial court should have inquired about the joint representation and should have obtained a waiver from him before permitting him to go to trial represented by an attorney who had represented two of his co-defendants at previous stages in the case. While we agree that such inquiries are highly desirable,[1] the failure to conduct them does not result in automatic reversal. Rather, we submit that reversal is required only if the defendant can show that the joint representation produced a conflict of interest of a kind that may well have resulted in some prejudice to his defense.

This Court stated in *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978), that joint representation does not result in a per se violation of the Sixth Amendment. Indeed, the Court noted that in some circumstances joint representation may work to the defendant's advantage. *Id.* at 482-483; *Glasser* v. *United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., concurring). Accordingly, the Court declined to prohibit joint representation generally, and instead indicated that joint representation would lead to reversal of a conviction only if, absent waiver (see 435 U.S. at 483 n.5), there is some showing that the joint representation resulted in a conflict of interest for the attorney. 435 U.S. at 481-483, 487. See *United States* v. *Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976); *United States* v. *Mandell*, 525 F.2d 671, 677 (7th Cir. 1975), cert.

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[1] Indeed, they would be required as a matter of course under proposed Rule 44(c), Fed. R. Crim. P.

denied, 423 U.S. 1049 (1976); *United States* v. *Truglio*, 493 F.2d 574, 580 (4th Cir. 1974); *United States* v. *Foster*, 469 F.2d 1, 4 (1st Cir. 1972).[2] On the particular facts presented, however, the Court in *Holloway* did not require a showing of prejudice to the defendants as a result of the joint representation of what the Court found (435 U.S. at 489-491) to be their conflicting interests. Counsel in *Holloway*, on behalf of all co-defendants, had filed a timely objection to the joint representation, and the Court held that prejudice should be presumed to have resulted under such circumstances (*ibid.*), at least absent a determination by the trial court after careful consideration of the objection that no conflict of interest existed.

In *Holloway*, the Court observed that there is some disagreement among the circuits over how strong a showing of conflict of interest must be made, or how certain a reviewing court must be that the asserted conflict existed, before it will conclude that a defendant was deprived of his right to the effective assistance of counsel. 435 U.S. at 483. But whatever the proper standard, it is clear that some showing of a conflict of interest is necessary.

In this case, the court of appeals correctly held that petitioner had failed to show there was any conflict

[2] *Stephens* v. *United States*, 595 F.2d 1066 (5th Cir. 1979), and *United States* v. *Alvarez*, 580 F.2d 1251 (5th Cir. 1978), on which petitioner relies (Pet. 16), likewise involved situations in which the court found that the lawyer was laboring under a conflict of interest—in those cases, because the lawyer was representing prosecution witnesses and the defendant.

of interest created by his attorney's representation of Alcantar, Lopez, and petitioner. Petitioner was tried alone, and the co-defendants represented by his counsel were not tried. By the time of his second trial—the one under review here—Lopez had long since disappeared. Although petitioner suggests (Pet. 19) that some conflict of interest or prejudice resulted from Lopez's failure to testify, under the circumstances of Lopez's flight this can hardly be a ground for reversal, at least without some showing, absent here, that counsel knew of Lopez's whereabouts.

Petitioner contends (Pet. 17, 19) that a conflict of interest is demonstrated by his attorney's failure to call Alcantar to testify, because petitioner might have been able to shift the blame to Alcantar (see Pet. 6-7). But petitioner offers nothing more than speculation on this point. Moreover, Alcantar had already pleaded guilty and been sentenced by the time of the second trial. This surely suggests that counsel's failure to call Alcantar was not attributable to a fear of implicating him in the conspiracy. As the court of appeals stated (Pet. App. A11), "[t]he mere fact that Alcantar might have testified in [petitioner's] trial does not indicate an actual conflict. * * * [Petitioner's] allegations show no connection between the attorney's continuing duty to Alcantar after sentencing and Alcantar's failure to testify in [petitioner's] trial. [Petitioner] has shown us nothing in the record before the district court to indicate that Alcantar's testimony would have been helpful in any way."

Thus, to find a conflict of interest here would be, in effect, to announce a per se rule that, absent waiver, reversal is required whenever a lawyer who jointly represents co-defendants does not call one of them to testify.

Earlier this Term, the Court granted certiorari in *Cuyler* v. *Sullivan*, No. 78-1832 (Oct. 1, 1979), a case that raises the question of the nature of a showing of a conflict of interest that must be made for a conviction to be set aside under the Sixth Amendment. In *Cuyler* the court of appeals held that a defendant who has not previously waived his right to separate representation is entitled to relief if he can show that the joint representation in his case resulted in " 'a possible conflict of interest or prejudice, however remote.' " *United States ex rel. Sullivan* v. *Cuyler*, 593 F.2d 512, 519 (3d Cir. 1979), quoting *Walker* v. *United States*, 422 F.2d 374, 375 (3d Cir.), cert. denied, 399 U.S. 915 (1970).[3]

The possibility of a conflict in this case is remote (see pages 6-7, *supra*); the court of appeals upheld petitioner's conviction because he had shown no "actual

[3] The Third Circuit's decision in *United States ex rel. Sullivan* v. *Cuyler* does not adequately distinguish between a possibility of a conflict of interest and the possibility of prejudice resulting from a conflict of interest. A possibility of a conflict, "however remote," could be articulated in almost every case of joint representation. In our view, some more concrete indicia of an actual conflict of interest should be present in order for a Sixth Amendment violation to be found. Once such a conflict of interest is found, the nature of the showing of prejudice, if any, that must be made raises a quite separate issue.

conflict" resulting from the joint representation.[4] Thus, although we believe there was no Sixth Amendment violation here, the Court may wish to hold this case pending the decision in *Cuyler* v. *Sullivan* and to dispose of it in light of the decision in that case.

2. Petitioner also argues (Pet. 20-27) that the court of appeals should have dismissed the indictment against him on double jeopardy grounds. The error

[4] Use of the terms "potential," "possible," and "actual" conflict of interest may generate unnecessary confusion. In general, we would think that the term "potential" or "possible" conflict of interest would ordinarily be applicable at the outset of the representation, when the likelihood of an actual conflict arising cannot be accurately predicted. After trial, however, it would be feasible, given complete information, to determine whether an actual conflict of interest was present. The more difficult question would be whether that conflict had affected counsel's conduct, and thereby prejudiced the defense. But if a possible or potential conflict identified at the outset failed to ripen into an actual conflict, there would clearly have been no Sixth Amendment violation.

Thus, when used on appeal of a conviction, the term "possible" conflict of interest would not appear to be an independent standard, but rather a description of the strength of the showing the defendant must make that his lawyer labored under an *actual* conflict of interest. For example, while a defendant or a court might speculate in any case that the mere failure to call a co-defendant could "possibly" have been due to a conflict of interest, a greater showing should be required before a court can infer the existence of an *actual* conflict giving rise to a Sixth Amendment violation. As pointed out above, if the mere failure to call a co-defendant to testify—the only showing made by petitioner here—demonstrates a "possible" conflict requiring reversal without any specific allegations of the reasons for not calling the witness, to what he could have testified, or any other factors that might be probative of an actual conflict, an automatic reversal rule would result.

in the prosecutor's summation at the first trial that resulted in the district court's granting a new trial was so serious, petitioner contends, that the prosecution should not have been allowed to try him a second time.

In closing argument in the first trial, the prosecutor noted that petitioner had placed his initials, "R.H.M.," on his garbage can. The prosecutor argued that these initials stood for "Rodolfo Herrera-Medina." As the court of appeals noted, this argument was justified by the evidence, because one of petitioner's co-conspirators had identified his source of heroin as "Herrera" (Pet. App. A7). Because the name "Herrera" had previously appeared in the local media in connection with narcotics trafficking, petitioner's counsel moved for a mistrial based on the prosecutor's reference to his name. The trial court criticized the prosecutor's argument but denied the motion for a mistrial at that time. After the jury returned a guilty verdict, the court granted petitioner's motion for a new trial, based on the prosecutor's reference to the name "Herrera" in his rebuttal argument. The court stated that while the argument was sufficiently prejudicial to warrant a mistrial, "we do not find government counsel's conduct to be either grossly negligent or intentional" (Pet. App. A9). Accordingly, the court denied petitioner's motion to dismiss the indictment on double jeopardy grounds (Pet. App. A7-A10).

The court of appeals noted that the prosecutor's statement was "an isolated incident and was at least

arguably based on evidence at trial" (Pet. App. A10). Accordingly, the court declined to overturn the trial court's determination that the prosecutor's statement was not so overreaching or so grossly abusive as to preclude a second trial (*ibid.*).

When the court denies the defense's motion for a mistrial and later grants the defendant's motion for a new trial following the return of a verdict of guilty by the jury, the Double Jeopardy Clause does not bar retrial. *United States* v. *Dinitz*, 424 U.S. 600, 610 (1976); *United States v. Ball*, 163 U.S. 662 (1896). In such a case, the defendant's " 'valued right to have his trial completed by a particular tribunal' " (see *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978), quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)) has been protected.[5]

Moreover, the prosecutor's comment, if error at all, was hardly the kind of grossly improper argument that can only have been intended to provoke a mistrial. This Court has stated on several occasions that if a prosecutor intentionally provokes a mistrial in the hope of obtaining a more favorable jury on retrial, the Double Jeopardy Clause might require dismissal of the indictment. See *United States* v. *Tateo*, 377 U.S. 463, 468 n.3 (1964); *United States* v. *Dinitz*, *supra*, 424 U.S. at 611; *Arizona* v. *Washington*, *supra*, 434 U.S. at 507-508. But the error in this case does not even remotely approach this mag-

[5] Thus, the court of appeals erred (Pet. App. A9 n.5) in equating, for Double Jeopardy purposes, petitioner's motion for a new trial and the mistrial involved in *Dinitz*.

nitude. Both the district court and the court of appeals found the prosecutor's comment not to have been either grossly negligent or intentional (Pet. App. A9-A10), and nothing in the nature or circumstances of the comment suggests that this determination is incorrect.[6] Accordingly, there is no basis for holding that the Double Jeopardy Clause was violated by petitioner's retrial.

CONCLUSION

The petition for a writ of certiorari should be denied or, in the alternative, held pending the disposition of *Cuyler* v. *Sullivan*, No. 78-1832.

Respectfully submitted.

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[6] Petitioner relies (Pet. 21) on the district court's statement during trial that the prosecutor "deliberately tried to prejudice the jury" by referring to petitioner's name. As the court of appeals pointed out, however, that comment was made "spontaneously and without giving the Government an opportunity to reply to the defendant's mistrial motion" (Pet. App. A9). The court's remark was effectively amended by the court's subsequent finding that the prosecutor's conduct was neither "grossly negligent [nor] intentional" (*ibid.*).

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